

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

SENSATIONAL SMILES LLC,
D/B/A SMILE BRIGHT,

Plaintiff,

v.

DR. JEWEL MULLEN, ET AL.,

Defendants.

Civil Action No.
3:11-CV-01787-MPS

Date: June 13, 2013

**PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

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Introduction

Defendants (collectively “the Commission”) dismiss this case as “frivolous and unnecessary.” Defs.’ MSJ Resp. at 29. On the contrary, as applied to Plaintiff Smile Bright, it is the Commission’s declaratory ruling that is frivolous and unnecessary: It is irrational to require anyone to have eight years of higher education before he may point an LED light at someone’s mouth, and nothing in the Commission’s brief demonstrates otherwise.

Before further discussing the Commission’s failure to provide either legal or factual support for this irrational policy, Smile Bright will briefly summarize the facts that led to this lawsuit. In June 2011, the Connecticut Dental Commission enacted a broadly worded declaratory ruling, the plain language of which seems to prohibit much of what Smile Bright used to do in offering teeth-whitening services, including “advising individuals on the use of trays” and “instructing a customer on teeth whitening procedures or methods.” Decl. of Paul Sherman in Supp. of Pl.’s Mot. for Summ. J. (Sherman Decl.), Ex. 1, at 6. Based on that ruling, the Department of Public Health sent cease-and-desist letters to teeth whiteners throughout Connecticut, including Smile Bright, that repeated this broad language. Sherman Decl., Ex. 2. Smile Bright stopped offering these services as a result.

Now that the Commission has been sued, however, it has adopted an interpretation of its declaratory ruling that is far narrower than the plain language of that ruling. Under this new interpretation, the only activity of Plaintiff’s that is prohibited is the positioning of an LED light in front of a customer’s mouth. *See, e.g.*, Defs.’ MSJ Resp. at 1.¹ It is, frankly, implausible that the

¹ As Plaintiff noted in its response to the Commission’s motion for summary judgment, Pl.’s MSJ Resp. at 4 n.2, despite this claim, the Commission remains coy about what instructions a teeth whitener may permissibly give a customer. *See* Defs.’ MSJ Resp. at 3 (stating that “defendants have indicated that it is not the practice of dentistry to provide a client with the instructions that are provided by the manufacturer of the product.”). To the extent that the Commission believes that it *is* the practice of dentistry for Plaintiff Smile Bright to provide customers with spo-

declaratory ruling and the cease-and-desist letters quoting it were intended to have such an infinitesimal effect on teeth whiteners, or that the simple act of positioning LED lights led dentists to demand that the Commission take action against their non-dentist competitors.² And while the Commission criticizes Plaintiffs for failing to anticipate this abrupt about-face, it has only itself to blame: When Plaintiff attempted to clarify the scope of the declaratory ruling during its properly noticed 30(b)(6) deposition of the Commission, opposing counsel refused to allow the Commission's designated witness to answer questions regarding the scope of the ruling. Decl. of Paul Sherman in Supp. of Pl.'s Reply in Supp. of Pl.'s Mot. Summ. J., Ex. 14, at 27:25-29:6; 30:13-17.

Nevertheless, if the Commission does not want to defend the plain language of its declaratory ruling, Plaintiff has no objection. This Court has the authority to enter a declaration that, with the sole exception of positioning LED lights, the declaratory ruling has no application to any of the activities that Plaintiff previously engaged in, all of which are described in Plaintiff's motion for summary judgment. *See* Pl.'s MSJ Br. at 5-7. The only question remaining before this Court, then, is whether it is rational to require a person to have eight years of higher education before he may point a harmless LED light at another person's mouth. As explained below, Plaintiff has demonstrated that it is entitled to judgment as a matter of law on this question, and the Commission has not demonstrated that any material facts are in dispute.

ken instruction on the use of teeth whitening products, or any instruction other than "the instructions that are provided by the manufacturer of the product[s]" themselves, the Commission has not rebutted Plaintiff's showing that this restriction is unconstitutionally irrational. *See* Pl.'s MSJ Resp. at 11, 13, 18.

² *Cf. N.C. State Bd. of Dental Exam'rs v. FTC*, No. 12-1172, 2013 U.S. App. LEXIS 11006, at *33 (4th Cir. May 31, 2013) (affirming FTC ruling that cease-and-desist letters to non-dentist teeth whiteners were "concerted action excluding a lower-cost and popular group of competitors," and "[n]o advanced degree in economics is needed to recognize" that the behavior "is likely to harm competition." (internal citation omitted)).

I. The Commission Has Not Refuted Plaintiff's Showing That Plaintiff Is Entitled to Judgment As a Matter of Law.

As Smile Bright explained in its opening brief, summary judgment is appropriate for three reasons. First, to the extent the declaratory ruling prohibits any of the activities that Smile Bright actually engaged in, there is no logical connection between that ruling and any legitimate government interest. Pl.'s MSJ Br. at 22-26. Second, even if there were some theoretical connection between the declaratory ruling and a legitimate government interest, the costs the declaratory ruling imposes on businesses like Smile Bright are so vastly disproportionate to any hypothetical benefits as to be unconstitutional. *Id.* at 26-28. Finally, there is evidence that the true purpose of the declaratory ruling is an illegitimate interest in protecting dentists from honest competition. *Id.* at 28-30.

In response to these arguments, the Commission now takes the position that the *only* activity of Smile Bright's that violates the declaratory ruling is the positioning of the LED light. Defs.' MSJ Resp. at 1. But nowhere in its response brief does the Commission even attempt to explain why it is rational to require a person to have eight years of higher education before he may lawfully position an LED light that a customer may position with no training or education. Instead, the Commission simply goes on at length about the deferential nature of the rational-basis test and the government's interest in regulating activities—such as making custom teeth molds—that are not at issue in this case.

Had the Commission attempted to justify its restriction on light positioning, it would have failed. The facts show that LED lights like Smile Bright's are harmless. Pl.'s Rule 56(a)(1) Statement ¶¶ 49-52. The Commission has not produced a scintilla of admissible evidence to dispute this fact, and even the inadmissible evidence upon which it relies does not demonstrate even

a single incident of a person suffering harm from teeth whitening that is attributable to the presence or absence of an LED light.³

Moreover, even if there were evidence to demonstrate that LED lights posed some risk to teeth-whitening customers, there is no evidence to demonstrate that this risk varies based on the identity of the person positioning the light, whether that person is the customer, a non-dentist teeth whitener, or a dentist. On the contrary, Dr. Giniger provided unrebutted testimony that the presence of a non-dentist who is familiar with the teeth-whitening procedure can only enhance the safety of that procedure. Pl.'s Rule 56(a)(1) Statement ¶ 62.

Finally, even if this Court accepted the implausible claim that LED lights positioned by non-dentists pose risks that are not present when those lights are positioned by untrained customers, there is nothing in the record to suggest that dental education does anything to ameliorate that risk. On the contrary, the record makes clear that dental schools do not teach any aspect of teeth whitening and that neither the Commission nor the Department of Public Health requires aspiring dentists to have any experience with or proficiency in any aspect of teeth whitening. *See* Pl.'s Rule 56(a)(1) Statement ¶¶ 64-66, 81-85.

These facts make this case much like the many cases *Smile Bright* cites in which federal courts found either that there was no rational relationship between the government's purported ends and the means chosen to pursue those ends, or that the mismatch between the government's ends and the means it had chosen were so extreme as to be irrational. Pl.'s MSJ Br. at 22-28. The

³ The Commission refers to a single incident in which a teeth-whitening customer suffered temporary burns on the inside of her lips. *See* Defs.' MSJ Resp. at 13. This incident is irrelevant because the Commission provides no evidence, nor does it even claim, that those temporary injuries were caused or exacerbated by an LED light. Moreover, Dr. Giniger discussed this specific incident in his expert report, noting that such side effects are not uncommon, resolve on their own, and occur whether the product is purchased from a drugstore, applied by a dentist, or self-applied by a non-dentist at a mall or salon. Dr. Giniger is available to testify about this incident at trial in the event this Court believes it to be relevant.

Commission, for its part, makes almost no effort to distinguish these cases.⁴ Instead, the Commission analogizes this case to three cases involving midwifery, school bus drivers, and psychology. Defs.' MSJ Resp. at 25-27 (citing *Lange-Kessler v. Dep't of Educ.*, 109 F.3d 137 (2d Cir. 1997), *Hill v. Gill*, 703 F. Supp. 1034 (D. R.I. 1989), and *Karan v. Adams*, 807 F. Supp. 900 (D. Conn. 1992)). But as Smile Bright explained in response to the Commission's cross-motion for summary judgment, Pl.'s MSJ Resp. at 14-16, these three cases are easily distinguishable. In *Lange-Kessler* there was a clear connection—backed by expert testimony—between the requirements imposed on midwives and the promotion of public health and safety. 109 F.3d at 139-40. Moreover, in all three cases, the plaintiffs did not dispute that the government had an interest in establishing qualifications for the activities they were engaged in; they just wanted an exception for their unique personal circumstances. *See Lange-Kessler*, 109 F.3d at 140-41; *Hill*, 703 F. Supp. at 1037-38; *Karan*, 807 F. Supp. at 902, 907.

Smile Bright, however, *does dispute* that the government has an interest in establishing qualifications for who can point LED lights at people's mouths. Indeed, it argues that Connecticut has no rational basis for regulating the positioning of LED lights—or any aspect of teeth whitening as they provide it—regardless of who does those things. Thus, unlike the Plaintiffs in *Lange-Kessler*, *Hill*, and *Karan*, Smile Bright is not denying that the government may set bright-line rules for who may engage in the practice of dentistry. Smile Bright is simply arguing—and has demonstrated—that the government has acted irrationally in defining what they do as the

⁴ The only case the Commission attempts to distinguish is *Plyler v. Doe*, 457 U.S. 202 (1982), one of several cases that Plaintiff cited for the proposition that courts will hold regulations unconstitutional if the costs they impose are vastly disproportionate to their public benefits. The Commission argues that its declaratory ruling imposes no costs on non-dentist teeth whiteners, and therefore *Plyler* is inapposite. Defs.' MSJ Resp. at 27-28. This is simply wrong: If non-dentists wish to position LED lights for their customers, they must first acquire eight years of expensive higher education. That real—and extreme—cost must be weighed against the declaratory ruling's entirely illusory benefits.

practice of dentistry. The Commission's brief, quite simply, fails to acknowledge this argument, let alone refute it. Accordingly, Smile Bright has demonstrated that it is entitled to judgment as a matter of law.

II. The Commission Has Failed to Demonstrate That Any Facts Are Genuinely in Dispute.

Perhaps because the Commission cannot distinguish the cases upon which Smile Bright relies, the Commission argues that Smile Bright's motion must be denied because there are disputed issues of material fact. Defs.' MSJ Resp. at 29.⁵ This is incorrect. As explained below, the Commission admits or, equivalently, fails to deny virtually all of Plaintiff's proposed facts. For the few facts that the Commission specifically denies, those denials are improper either because they amount to simple disputes about the characterization of a fact or because the Commission has not supported its denial with citation to admissible evidence. Accordingly, all of Plaintiff's proposed facts must be deemed admitted.

A. The Commission either admits or, equivalently, fails to deny the overwhelming majority of Plaintiff's proposed facts.

Plaintiff's Rule 56(a)(1) Statement contains 102 proposed statements of undisputed fact, 39 of which the Commission admits outright.⁶ For another 52 proposed facts, the Commission asserts that it has insufficient evidence to admit or deny the fact, disputes the relevance of the fact, or both.⁷ Such statements do not comply with the requirements of Local Rule 56(a)(3),⁸ and

⁵ This argument is puzzling because the Commission has filed a cross-motion for summary judgment, and any dispute over material facts would therefore defeat both motions. Summary judgment is appropriate, however, because, as explained below, the Commission has not established any genuine disputes of material fact.

⁶ See Defs.' Local Rule 56(a)(2) Statement ¶¶ 2-7, 9, 11, 17, 20, 54-57, 68-85, 90-94, 100, and 102.

⁷ *Id.* ¶¶ 8, 10, 12-16, 18-19, 21-39, 41, 43, 44-48, 59-66, 86-89, 96-99, and 101.

federal courts have repeatedly held that such statements are insufficient to constitute an appropriate denial.⁹ Accordingly, because the Commission has failed to appropriately deny any of the foregoing 52 facts, all of them must be deemed admitted. *Carone v. Mascolo*, 573 F. Supp. 2d 575, 581 (D. Conn. 2008) (“When a party fails to appropriately deny material facts set forth in the movant’s Rule 56(a)(1) statement, those facts are deemed admitted.”).

B. The remainder of Plaintiff’s proposed undisputed facts should be deemed admitted because Defendants have failed to produce admissible evidence to dispute these facts as required under Circuit precedent and the Local Rules.

The Commission explicitly denies only ten of Smile Bright’s proposed facts.¹⁰ As explained below, none of these denials presents a genuine dispute of material fact. Accordingly, these ten facts should also be deemed admitted. *Carone*, 573 F. Supp. 2d at 581.

The Commission’s denial of Proposed Fact 1 is simply a quibble over whether the cease-and-desist letter sent to Smile Bright was an “order” or a “letter.” Because the Commission does not challenge the content of the letter or that it was sent, this is nothing but a dispute over how best to characterize the letter, which is not a proper denial. *Carone*, 573 F. Supp. 2d at 581 (holding that denials were deficient where they were “not actual disagreements with the [party’s] statements, but instead [sought] to explain, or contextualize, [those] statements.”).

⁸ “[E]ach denial in an opponent’s Local Rule 56(a)2 Statement[] *must* be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial.” (emphasis added).

⁹ See, e.g., *Karazanos v. Madison Two Assocs.*, 147 F.3d 624 (7th Cir. 1998) (holding that the “equivocation” that a party lacks sufficient information to admit or deny a properly supported fact is “an admission, not a denial”); *Gateway Equip. Corp. v. United States*, 247 F. Supp. 2d 299, 304 n.10 (W.D.N.Y. 2003) (accepting plaintiff’s proposed facts as true where “[t]he government did not admit or deny them in its Statement of Disputed Facts; it simply responded that such facts were ‘irrelevant’”).

¹⁰ Defs.’ Local Rule 56(a)(2) Statement ¶¶ 1, 40, 49-53, 58, 67, and 95.

The Commission's remaining denials are improper because they are unsupported by admissible evidence. For one of its denials, the Commission does not provide any evidence and simply states "deny." *See* Defs.' Rule 56(a)(2) Statement ¶ 51. For another, denying Smile Bright's claim that its owners feared civil or criminal penalties under the declaratory ruling, the Commission simply cites the declaratory ruling, which contains nothing relevant to the owners' alleged state of mind. *Id.* ¶ 95.

For the remaining seven denials, the only "evidence" that the Commission cites to are the findings of fact made in its declaratory ruling. *Id.* ¶¶ 40, 49-53, 58, 67. But, as explained below, this supposed evidence is both irrelevant and inadmissible.¹¹

The Commission's findings were based on the testimony of Dr. Jonathan Meier at the Commission's declaratory hearing. *See Id.* ¶ 49. But the Commission does not identify a single statement in Dr. Meier's former testimony or anywhere in the 150-plus pages of material appended to that testimony that identifies any risk associated with the *identity* of the person positioning an LED light, nor is the existence of such a risk even conceivable.¹² Accordingly, even if this testimony establishes a dispute of fact between the parties, it is not a dispute that is material to the resolution of the one thing the Commission claims is at issue in this case: the constitutionality of prohibiting non-dentists from positioning LED lights in front of their customers' mouths.

Moreover, the Commission has not carried its evidentiary burden under this Circuit's precedent and Local Rule 56(a)(3). "In order to defeat a properly supported summary judgment motion, the opposing party must proffer *admissible* evidence that 'set[s] forth specific facts'

¹¹ The Commission cites this same evidence in its qualified admission to Pl.'s Rule 56(a)(1) Statement ¶ 42. For the reasons discussed below, this fact should simply be deemed admitted.

¹² On the contrary, Plaintiff's expert Dr. Giniger provided unrebutted, sworn testimony in this case that assistance from a non-dentist who is familiar with the teeth-whitening process can only add to the safety of that process, not detract from it. Pl.'s Rule 56(a)(1) Statement ¶ 62.

showing a genuinely disputed factual issue that is material” *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008) (emphasis added); *see also* Local Rule 56(a)(3) (requiring denials to be supported by admissible evidence). But, as explained in Plaintiff’s Rule 56(a)(2) Statement and in Plaintiff’s Response to Defendants’ Motion for Summary Judgment, these statements, if taken for their truth, are inadmissible hearsay. *See* Pl.’s Rule 56(a)(2) Statement at 1-2; Pl.’s MSJ Resp. at 4-5; *see also Feingold v. New York*, 366 F.3d 138, 155 n.17 (2d Cir. 2004) (noting that courts may not consider hearsay on summary judgment).

Besides being inadmissible hearsay, these statements are also inadmissible as improper expert opinion. The Commission admits as much when it states that “[t]hese findings of fact were based upon the testimony and written evidence submitted by Dr. Jonathan Meiers who is an expert in the field of dentistry and has expertise in the field of teeth whitening.” *See* Defs.’ Local Rule 56(a)(2) Statement at 4 (Response to Fact 49); *see also* Defs.’ MSJ Resp. at 12 (arguing that “[i]n cases such as this, courts are wary of granting summary judgment when there are conflicting expert reports”). Thus, under the Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 26(a)(2), if the Commission wanted to prove the factual assertions set forth in Dr. Meier’s testimony to the Commission, it had an obligation to tender him—or somebody else—as an expert in this case.¹³ The Commission had ample opportunity to do so under this Court’s

¹³ The facts that Dr. Meier offered testimony before the *Commission* and that the Commission found that testimony persuasive are simply irrelevant to whether his opinions are admissible in this case. Testimony from a former proceeding—including, specifically, any “hearing”—is admissible only if 1) the witness is unavailable to testify in the current proceeding, and 2) the testimony is offered against a party who had “an opportunity and similar motive to develop it by direct, cross-, or redirect examination.” Fed. R. Evid. 804(b)(1)(B). The Commission has not demonstrated that Dr. Meier would have been unavailable to serve as an expert witness in this case, nor would the Commission’s declaratory ruling proceeding have provided Plaintiff Smile Bright with an opportunity or similar motive to cross-examine Dr. Meier.

scheduling order, yet Dr. Meier was not disclosed as an expert per that order, he submitted no expert report, and he has not even provided a sworn declaration.

Had the Commission complied with the scheduling order and properly disclosed Dr. Meier, or some other expert witness competent to support the Commission's alleged facts, Plaintiff would have deposed that witness and also submitted a report by its own expert, Dr. Martin Giniger, in rebuttal. But the Commission took none of these steps and Smile Bright was thus denied this opportunity. Accordingly, these opinions must be excluded. *Atlantis Info. Tech. v. CA, Inc.*, No. 06-cv-3921, 2011 U.S Dist. LEXIS 111085, at *36-37 (E.D.N.Y. Sept. 28, 2011) (excluding undisclosed expert testimony where expert report had not been disclosed prior to summary judgment).

* * *

Because the Commission has not properly disputed any of Smile Bright's proposed facts, all of the facts set forth in Smile Bright's Rule 56(a)(1) Statement should be deemed admitted for purposes of Smile Bright's Motion for Summary Judgment.

Conclusion

For the foregoing reasons, this Court should grant Smile Bright's motion for summary judgment, declare that the Commission's declaratory ruling has no constitutional application to Smile Bright's services, and enjoin the Commission from enforcing the declaratory ruling against those services.

Respectfully submitted,

Institute for Justice

/s/ Paul M. Sherman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 13, 2013, a true and correct copy of the foregoing

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY

JUDGMENT was sent via the Court's CM/ECF to the following counsel of record:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

SENSATIONAL SMILES LLC,
D/B/A SMILE BRIGHT,

Plaintiff,

Civil Action No.
3:11-CV-01787-MPS

v.

Date: June 13, 2013

DR. JEWEL MULLEN, ET AL.,

Defendants.

**DECLARATION OF PAUL SHERMAN IN SUPPORT OF
PLAINTIFF'S REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**


I, Paul Sherman, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the Commonwealth of Virginia, and over the age of 18 years. I make this declaration in support of Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment; it is based on my personal knowledge of the facts stated herein.

2. Attached as Exhibit 14 to this declaration is a true and correct copy of the transcript of the 30(b)(6) deposition of the Connecticut Dental Commission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 13, 2013.


Paul Sherman

Declaration of Paul Sherman in Support of
Plaintiff's Reply in Support of Plaintiff's
Motion for Summary Judgment

EXHIBIT 14

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF CONNECTICUT
3

4 Civil Action No.: 3:11-CV-01787-WWE

5 - - - - -
6 SENSATIONAL SMILES, LLC, d/b/a SMILE BRIGHT,
7 Plaintiff,

8 vs.

9 DR. JEWEL MULLEN, ET AL,
10 Defendants.
11 - - - - -

12
13 30(b)(6) DEPOSITION OF THE
14 DEPARTMENT OF PUBLIC HEALTH

15 By: JEANNE STRATHEARN

16 January 4, 2013
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23
24
25

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25

1 ...The following is the
2 30(b)(6) Deposition of the Department of
3 Public Health by: JEANNE STRATHEARN,
4 Chairperson, Connecticut State Dental
5 Association, 835 West Queen Street,
6 Southington, Connecticut 06489, pending in
7 the United States District Court, for the
8 District of Connecticut, pursuant to Notice
9 and the Federal Rules of Civil Procedure,
10 before Jill K. Ruggieri, C.R.R., R.M.R.,
11 L.S.R. 506, a Notary Public duly commissioned
12 and qualified, at the offices of United
13 Reporters, Inc., 90 Brainard Road, Suite 103,
14 Hartford, Connecticut, on January 4, 2013, at
15 9:32 a.m., at which time counsel appeared as
16 hereinbefore set forth...

17 STIPULATION

18 The deposition may be signed
19 before any Notary Public.

1 J E A N N E S T R A T H E A R N ,
2 called as a witness, being first duly
3 sworn by Jill K. Ruggieri, C.R.R.,
4 R.M.R., L.S.R. 506, a Notary Public duly
5 commissioned and qualified, was examined
6 and testified on her oath as follows:

7 DIRECT EXAMINATION

8 BY MR. SHERMAN:

9 Q. Good morning.

10 A. Good morning.

11 Q. My name is Paul Sherman. I
12 represent the Plaintiffs in this lawsuit.

13 Could you please state your name
14 and your title for the record.

15 A. I'm Jeanne Strathearn. I'm a
16 general dentist, and I'm the chairperson for
17 the Connecticut State Dental Commission.

18 Q. Okay. Have you ever had your
19 deposition taken before?

20 A. No.

21 Q. Okay. Well, there's nothing to it.
22 All there is to it is, I will ask questions
23 and you have to provide truthful answers.
24 And my job is to ask clear, understandable
25 questions, so if I ask any question that you

1 don't understand or that doesn't make sense
2 to you, just let me know, and I'll try to ask
3 the question in a way that makes sense.

4 If you need a break at any time,
5 feel free to ask. I would just ask that, if
6 there's a question pending, you answer the
7 question, and then we can take a break. If
8 you need water or coffee or anything like
9 that, just let me know.

10 Is there any reason why you
11 wouldn't be able to testify truthfully today?

12 A. No.

13 Q. I didn't think so.

14 MR. SHAPIRO: Just so the
15 record is clear, I'm Daniel Shapiro from the
16 Attorney General's Office, and I'm
17 representing the Dental Commission.

18 MR. SHERMAN: All right. Why
19 don't we just mark this as Exhibit 1.

20 (Plaintiff's Exhibit 1:
21 Marked for identification - described in
22 index.)

23 BY MR. SHERMAN:

24 Q. So we've marked as Exhibit 1 the
25 notice of deposition that I sent to Attorney

1 Shapiro in this case.

2 Have you seen this document before?

3 A. Yes.

4 Q. You're aware that you've been
5 chosen by Attorney Shapiro to represent the
6 Dental Commission as a witness?

7 A. I -- I'm speaking as a person and a
8 member of the Commission. I can't speak for
9 the entire Commission.

10 Q. Okay. Well, could you do me a
11 favor? If you look at the bottom of the
12 first page and then through to the second
13 page, you'll see that there's a list of nine
14 different subject areas.

15 Would you mind reading through
16 those just silently to yourself?

17 A. (Witness complies.)

18 Q. Do you have experience with the
19 matters that are set forth in those nine
20 numbered paragraphs?

21 A. I do have experience.

22 Q. Okay. Do you feel qualified to
23 talk about those areas?

24 A. About some of the areas.

25 Q. Okay. Are there particular areas

1 that you don't feel qualified to talk about?

2 A. Yes.

3 Q. Okay. Could you indicate which
4 ones those are?

5 A. (Deponent reads document.)

6 The Commission doesn't receive
7 complaints.

8 Q. Okay. So one of the things -- I
9 may have some personal confusion about the
10 various roles of the commission and the
11 Department of Health. So at any point I ask
12 you a question where that's what the
13 Department of Health does, just let me know.

14 A. Okay. The complaints are received
15 by the Department of Public Health.

16 Q. Okay.

17 MR. SHAPIRO: I'm not sure
18 what you're asking the witness to do right
19 now in terms of -- do you have questions
20 about these individual areas? I mean, is she
21 supposed to make a declaration about these
22 areas in terms of what --

23 MR. SHERMAN: Well, I -- I
24 want to -- I mean, this is a 30(b)(6)
25 deposition.

1 MR. SHAPIRO: Yes.

2 MR. SHERMAN: I was required
3 to inform you what areas I want to explore
4 with a representative of the Dental
5 Commission. I want to make sure that she
6 will be able to explore these areas.

7 A. The commission doesn't establish
8 the requirements for licensure in Connecticut
9 as a dentist or a dental hygienist.

10 BY MR. SHERMAN:

11 Q. Okay. All right.

12 Well, why don't we -- we'll get
13 into the questions, and if stuff comes up
14 that's not the Commission's role, it's the
15 Department of Health's role, we'll just note
16 that at each step as we go through.

17 What did you do to prepare for this
18 deposition?

19 A. I met with Attorney Shapiro for 50
20 minutes on Wednesday, January 3rd --
21 January 2nd.

22 Q. I think it's January 2nd.

23 A. Today's the 4th.

24 Q. Okay. Did you talk with anyone
25 other than Attorney Shapiro?

1 A. No.

2 Q. Okay. Did you review any documents
3 to prepare for today's deposition?

4 A. I reviewed the declaratory ruling.

5 Q. Okay. No other documents?

6 A. I read this document.

7 Q. Anything else?

8 A. No.

9 Q. Could you describe your educational
10 background, please?

11 A. I went to dental hygiene school,
12 and then I went to dental school.

13 Q. What degree in dentistry do you
14 have?

15 A. DDS.

16 Q. What's the difference between a DDS
17 and a DMD?

18 A. There's no difference. It depends
19 on the school you go to.

20 Q. Law schools do the same thing.
21 Some have JDs and some have, I think, LLBs.
22 When did you graduate from dental
23 school?

24 A. 1986.

25 Q. And you've been practicing as a

1 dentist since then?

2 A. Yes.

3 Q. Okay. How long was your course of
4 study in dentistry?

5 A. Four years.

6 Q. Okay. Is that typical?

7 A. I believe so.

8 Q. How long have you served on the
9 Dental Commission?

10 A. Since the year 2000.

11 Q. And you're currently the chair of
12 the Dental Commission?

13 A. Yes.

14 Q. And how long have you served as
15 chair?

16 A. Since March of 2007.

17 Q. How were you selected to be on the
18 commission?

19 A. I don't know.

20 Q. Is the commission a full-time job,
21 serving on the commission a full-time job?

22 A. I'm not sure what you mean as --
23 when you say it's a full-time job.

24 Q. Okay. Are you paid for serving on
25 the commission?

1 A. No.

2 Q. Okay. What responsibilities make
3 up your current job at the commission?

4 A. We are entrusted with assuring
5 compliance of the statutes regarding
6 dentistry.

7 Q. How does the commission go about
8 doing that?

9 A. We -- two ways, by the current
10 statutes and by declaratory rulings.

11 Q. Does the commission have employees
12 other than the commissioners themselves?

13 A. There are no employees.

14 Q. So is the commission just literally
15 the commissioners?

16 A. Yes.

17 Q. You said a moment ago that the
18 Commission assures compliance with the
19 current statutes. How does it assure
20 compliance with the current statutes?

21 A. On a case-by-case basis.

22 Q. Does the Commission conduct
23 investigations as to whether people have
24 violated the statutes?

25 A. The Commission does not conduct

1 investigations.

2 Q. Okay. Does the Department of
3 Health?

4 A. Yes.

5 Q. Does the commission assess fines or
6 penalties against violaters?

7 A. No.

8 Q. That's also the Department of
9 Health?

10 A. Yes.

11 Q. What role does the commission play
12 in assuring compliance?

13 A. It provides advice and consent to
14 the Department of Public Health.

15 Q. Does the commission help guide the
16 department in the interpretation of the
17 statutes?

18 MR. SHAPIRO: Can you say the
19 question again?

20 MR. SHERMAN: Sure.

21 BY MR. SHERMAN:

22 Q. Does the commission help to guide
23 the Department in interpreting the statutes?

24 A. I think the statutes speak for
25 themselves.

1 Q. Okay. What I'm trying to get a
2 handle on is what -- what role the commission
3 plays, what -- what does the commission do?

4 A. The commission provides advice and
5 consent --

6 Q. Okay.

7 A. -- to the Department of Public
8 Health.

9 Q. What kind of advice?

10 A. The department may bring something
11 to the commission after an investigation with
12 an order associated with it.

13 Q. Yes.

14 A. The commission will provide advice
15 and consent regarding the order.

16 Q. Okay. Can you give me an example
17 of the time that this has happened and sort
18 of the way it plays out? I just want to
19 understand the process.

20 A. If a dentist has been -- if a
21 complaint has been filed to the department of
22 Public Health against a dentist for perhaps
23 prescribing narcotics in a way that shouldn't
24 have been prescribed, the department will
25 investigate and have meetings with the

1 dentist and the dentist's -- and the
2 associated structure for the investigation,
3 and the Department will propose a remedy and
4 bring that remedy to the Dental Commission.

5 Q. Okay.

6 A. And the Dental Commission may vote
7 in favor of it or -- or may not.

8 Q. What happens if the Dental
9 Commission votes against the proposed remedy?

10 A. The Department will decide how to
11 proceed.

12 Q. Okay. So that's the -- the
13 Department can ignore the Dental Commission's
14 vote?

15 A. The Department can ignore the
16 Dental Commission's vote.

17 Q. Are you aware of times when that
18 has occurred or does --

19 A. No.

20 Q. So the Department -- the typical
21 practice is they follow your vote?

22 A. Yes.

23 Q. Does the commission promulgate
24 regulations related to dentistry?

25 A. No.

1 Q. That's the Department?

2 A. Yes.

3 Q. A while back you mentioned that the
4 other way that the commission assures
5 compliance with statutes is through
6 declaratory rulings. What is a declaratory
7 ruling?

8 A. If you refer back -- can you
9 rephrase the beginning of your question?

10 Q. Sure. So earlier we were talking
11 about the roles of the commission, and you
12 said that the commission assures compliance
13 with the statutes, and you said that there
14 are two ways you do that, and I believe you
15 said you assure compliance with the current
16 statutes and you issue declaratory rulings.

17 So I'd like to talk about
18 declaratory rulings. First off, what is a
19 declaratory ruling?

20 A. A declaratory ruling is a -- an
21 issuance of -- of a decision based on a
22 question brought.

23 Q. A question brought by whom?

24 A. It could be any numbers of parties.

25 Q. So it doesn't have to come from the

1 Department of Public Health? It could come
2 from a private citizen?

3 A. I'm not sure I'm clear on the
4 question.

5 Q. Okay.

6 MR. SHAPIRO: Let me just
7 object to the question in the sense that the
8 answer to the question is provided in the
9 statutes, that there's no independent duty of
10 the commission to have a say in that issue,
11 meaning the answer to who can bring a
12 declaratory ruling or what a declaratory
13 ruling is in the Connecticut General Statute.

14 MR. SHERMAN: Okay.

15 BY MR. SHERMAN:

16 Q. Can you walk me through the
17 declaratory ruling process?

18 A. This particular declaratory ruling
19 process?

20 Q. First just in general?

21 A. The Commission may decide to go
22 forward and issue a declaratory ruling, and
23 there are certain procedures which must be
24 followed. And with the help of our attorney
25 liaison, we follow the steps by issuing

1 notice and asking interested parties and
2 providing notice to interested parties and
3 then asking for testimony and posting.

4 And I can't tell you all the times,
5 but there's a certain procedure that was
6 followed -- that is followed, and the
7 declaratory ruling is held properly, and then
8 there are findings of fact, and then there is
9 a issuance of the declaratory ruling.

10 Q. Does the commission play any role
11 in determining whether someone is qualified
12 for licensure as a dentist in Connecticut?

13 A. No.

14 Q. Okay.

15 A. Excuse me. You are speaking of
16 initial licensure?

17 Q. Correct.

18 A. Yes.

19 Q. Had the Dental Commission taken any
20 public stance on teeth whitening before it
21 issued it's declaratory ruling in June of
22 2011?

23 MR. SHAPIRO: I'm going to
24 object. It's vague in terms of what the word
25 "stance" means.

1 BY MR. SHERMAN:

2 Q. You can answer the question if you
3 understand it.

4 A. I don't believe so.

5 Q. I saw a suggestion in one of the
6 documents produced by Attorney Shapiro that
7 the commission, during a meeting in June 2008
8 stated that teeth-whitening systems should
9 only be used by dentists. Do you know if
10 that's correct?

11 A. I don't remember.

12 Q. Had teeth whitening by non-dentists
13 been a subject of discussion at the
14 commission meetings?

15 A. No.

16 Q. Okay. It obviously became a
17 subject of discussion at some point?

18 A. Yes.

19 Q. Because you have the declaratory
20 ruling?

21 A. Yes.

22 Q. When did it first become a subject
23 of discussion?

24 A. I don't remember.

25 Q. Do you know approximately the year,

1 the month?

2 A. I don't remember.

3 Q. Okay.

4 MR. SHERMAN: I'd like to mark
5 this as Exhibit 2.

6 (Plaintiff's Exhibit 2:
7 Marked for identification - described in
8 index.)

9 BY MR. SHERMAN:

10 Q. Take a moment and look over this,
11 if you like.

12 A. (Witness complies.)

13 Q. Do you recognize this document?

14 A. Yes, I do.

15 Q. What is this document?

16 A. This is the declaratory ruling.

17 Q. Okay. Regarding teeth whitening?

18 A. Regarding teeth whitening.

19 Q. If you'll turn to the first page,
20 in the first sentence, it says, "On
21 September 8, 2010, the Connecticut State
22 Dental Commission, on its own motion,
23 initiated a declaratory ruling proceeding
24 regarding whether t-e-e-t-h whitening
25 practices and/or procedures constitute the

1 practice of dentistry," et cetera. That's a
2 correct statement?

3 A. Yes.

4 Q. Okay. What prompted the commission
5 to initiate the declaratory ruling process in
6 this case?

7 A. If I recall correctly, I believe
8 that members of the commission had heard some
9 information and stories and decided that the
10 commission should take a stand.

11 Q. Can you be more specific about the
12 type of information and stories that they
13 heard?

14 A. They weren't discussed.

15 Q. I'm sorry. Can you -- they weren't
16 discussed by the members of the commission?

17 A. The specifics.

18 Q. Okay. Had you heard any
19 information and stories?

20 A. I received two phone calls.

21 Q. From whom?

22 A. From -- from a dentist.

23 Q. Okay. Do you recall which dentist?

24 A. I do.

25 Q. Could you tell me who that is?

1 A. Dr. Gratovich.

2 Q. And he's a Connecticut licensed
3 dentist?

4 A. She's a licensed dentist in
5 Connecticut.

6 Q. Sorry. That was sexist of me. I
7 apologize.

8 A. No problem.

9 Q. But she is a Connecticut licensed
10 dentist?

11 A. Yes.

12 Q. Okay. What did Dr. Gratovich
13 relate to you in those phone calls?

14 A. Dr. Gratovich was worried about a
15 patient who was having her teeth whitened at
16 a salon and potential problems.

17 Q. Both the phone calls were about the
18 same patient?

19 A. One phone call was just a
20 procedural phone call.

21 Q. Okay. What do you mean by
22 "procedural" phone call?

23 A. What should she do.

24 Q. Okay. What should Dr. Gratovich do
25 or what should the patient do?

1 A. What should Dr. Gratovich do.

2 Q. Okay. What did you advise
3 Dr. Gratovich to do?

4 A. To call the Department of Public
5 Health.

6 Q. Do you know if Dr. Gratovich
7 followed your suggestion?

8 A. I don't know that.

9 Q. Do you know which teeth-whitening
10 business Dr. Gratovich's patient was going
11 to?

12 A. No.

13 Q. Did Dr. Gratovich communicate to
14 you that her patient had been harmed by teeth
15 whitening?

16 A. She did not communicate that to me.

17 Q. Okay. It was just more general
18 concern?

19 A. Yes.

20 Q. Okay.

21 What specific concerns did
22 Dr. Gratovich communicate, if any?

23 A. Dr. Gratovich was concerned of
24 potential harm.

25 Q. Did Dr. Gratovich indicate what

1 harm she was concerned about?

2 A. Burning tissues.

3 Q. Any other harms?

4 A. No.

5 Q. Other than the communication you
6 had with Dr. Gratovich, did you receive any
7 other information or stories about people
8 concerned about teeth whitening?

9 A. No.

10 Q. Okay. And you're aware other
11 members of the commission did, but they
12 didn't discuss those?

13 A. That's correct.

14 Q. Okay. Did the other members of the
15 commission indicate whether the information
16 and stories they received came from dentists?

17 A. I don't know that.

18 Q. Did a -- strike that.

19 No consumers of -- teeth whitening
20 consumers ever contacted you with concerns
21 about non-dentist teeth whitening, did they?

22 A. That's correct.

23 Q. Okay. Do you know if any consumers
24 contacted the other members of the
25 commission?

1 A. I don't know that.

2 Q. Do you know whether any of the
3 concerns that were expressed came from the
4 state dental association?

5 A. I don't know that.

6 Q. My understanding is that the
7 Connecticut State Dental Association is a
8 private organization and not a government
9 agency; is that correct?

10 A. Yes.

11 Q. Okay.

12 A. It's a not for profit.

13 Q. Okay. It's a professional trade
14 group?

15 A. It's a professional organization.

16 (Pause.)

17 A. It's not a trade group.

18 BY MR. SHAPIRO:

19 Q. Okay. Did any of the information
20 or stories that the commission received
21 indicate that any person had suffered
22 permanent harm as a result of teeth whitening
23 by a non-dentist?

24 A. I don't know that.

25 Q. Did any of the information or

1 stories indicate that any person had suffered
2 any harm?

3 A. I think the testimony -- in the
4 testimony of Dr. Myers, we heard that there
5 was.

6 Q. All right. Do you recall the
7 nature of that harm?

8 A. Burning tissues.

9 Q. Can you explain what you mean by
10 "burning tissues"?

11 A. Soft tissues harmed by the agents
12 applied without protective covering because
13 of a lack of protective covering.

14 Q. Would you characterize that as
15 permanent harm?

16 MR. SHAPIRO: I would object.
17 I think the question calls for speculation.
18 You can answer.

19 What -- you're asking in a
20 particular case?

21 MR. SHERMAN: I'm asking if --
22 BY MR. SHERMAN:

23 Q. Do you consider -- well --

24 A. I honestly don't know the answer to
25 that question.

1 Q. Okay. You do teeth whitening as
2 part of your dental practice?

3 A. Yes.

4 *Q. Would you describe the procedure
5 that you use?

6 MR. SHAPIRO: I would object.
7 It's irrelevant to the issues in the case at
8 hand. It's not potentially leading to
9 discoverable information about what this
10 particular dentist does in her personal
11 practice.

12 She's not being sued
13 individually. She's not being sued as an
14 individual dentist. She's a member of a
15 Commission that decided a case.

16 MR. SHERMAN: Well, I'm going
17 to ask you to limit speaking objections going
18 forward.

19 BY MR. SHERMAN:

20 Q. Do you understand the question?

21 A. Yes, but I understand the
22 objection.

23 MR. SHAPIRO: If the question
24 asks about her personal practice, I'm going
25 to instruct her not to answer the question.

1 BY MR. SHERMAN:

2 Q. Going back to the discussion of
3 soft tissue harm we were having a moment ago,
4 I believe you said there was concern that
5 teeth-whitening products could cause tissue
6 burning; is that correct?

7 A. That is correct.

8 Q. Okay. Do you recall whether any of
9 the stories or information that you received
10 about this particular concern -- strike that.

11 Since the passage of the
12 declaratory ruling, has the commission
13 received any more information or stories
14 about teeth whitening?

15 A. No.

16 Q. I'd like you to turn to page 5 of
17 the declaratory ruling, if you could.

18 The final sentence on this page,
19 which carries over to the following page,
20 could you read that to yourself, please.

21 A. (Witness complies.)

22 Q. It begins with "Applying the light
23 source."

24 A. (Deponent read document.)

25 Q. What does it mean to apply a light

1 source?

2 MR. SHAPIRO: I would object.
3 Dr. Strathearn has no authority to speak on
4 behalf of the commission with respect to the
5 meaning of declaratory ruling. She's a
6 member of a multimember commission.

7 BY MR. SHERMAN:

8 Q. Well, what's your understanding of
9 what it means?

10 A. I think --

11 MR. SHAPIRO: I would object.
12 It's irrelevant. It's irrelevant what her
13 understanding is. Are you asking her as an
14 individual dentist, as a member of the
15 public, as a member of the commission?

16 She can't speak for the
17 commission, and it's irrelevant what she
18 thinks it means as an individual.

19 BY MR. SHERMAN:

20 Q. How long have you been a dentist?

21 A. Twenty-six years.

22 Q. So is it the commission or the
23 position -- I'm sorry.

24 MR. SHERMAN: Is it the
25 position of the commission that the opinion

1 of the chair of the commission with 26 years
2 of experience as a dentist, with regard to
3 what it might mean to apply a light, is
4 irrelevant to the outcome of this lawsuit and
5 unlikely to produce discoverable information?

6 MR. SHAPIRO: Yes.

7 BY MR. SHERMAN:

8 Q. Why did the commission adopt this
9 declaratory ruling?

10 A. For protection of the public.

11 Q. Okay. How does this declaratory
12 ruling serve that purpose?

13 A. I think it speaks for itself.

14 MR. SHERMAN: Why don't we
15 take a ten-minute break.

16 A. Okay.

17 (Whereupon, a recess was
18 taken.)

19 BY MR. SHERMAN:

20 Q. We're almost done.

21 A. Okay.

22 Q. I just want to confirm a couple of
23 things before we wrap up.

24 A. Okay.

25 Q. So my understanding is that it is

1 the commission's position that you cannot
2 testify as to the meaning of the declaratory
3 ruling; is that correct?

4 A. Can you repeat the question?

5 Q. Sure. Earlier I asked you some
6 questions about the meaning of the
7 declaratory ruling --

8 A. Right.

9 Q. -- and Attorney Shapiro objected
10 and said that you're just one member of the
11 commission.

12 A. Right.

13 Q. So it's my understanding that the
14 commission's position is that you cannot
15 testify about the meaning of the declaratory
16 ruling; is that correct?

17 A. That's correct, the interpretation.

18 Q. Okay. And earlier we were talking
19 about concerns that people had expressed to
20 you about non-dentists doing teeth whitening,
21 and you mentioned that other members of the
22 commission had heard stories and information,
23 but you didn't know the substance of that?

24 A. That is correct.

25 Q. Okay. Could you have learned the

1 substance of those concerns by talking with
2 other members of the commission?

3 MR. SHAPIRO: I would object.
4 I don't understand the question.

5 Meaning could she have
6 investigated? Is that what you're asking?

7 MR. SHERMAN: Yes.

8 A. I suppose I could have.

9 BY MR. SHAPIRO:

10 Q. Okay. Do you have anything that
11 you want to add to the testimony that you've
12 given so far today?

13 A. I believe that the declaratory
14 ruling speaks for itself, and on a
15 case-by-case basis, it will be used by the
16 Dental Commission.

17 Q. Okay. And is there any testimony
18 that you've given that you want to correct or
19 that you think is incorrect?

20 A. Perhaps a couple of points may have
21 been clarified, but I don't believe I need to
22 correct anything.

23 Q. Okay. Is there anything that you
24 want to clarify before we conclude?

25 A. If the Department of Public Health

1 presents a consent order to the Dental
2 Commission and we rejected it, the department
3 has options on where they can proceed.

4 Q. What is a consent order?

5 A. The consent order is the
6 preliminary decision by the parties involved
7 that needs advice and consent by the Dental
8 Commission.

9 Q. Okay. Is that clarification in
10 reference to your earlier statement that the
11 Department of Health could choose to ignore
12 the commission's vote on a matter?

13 A. Yes, clarification.

14 Q. Okay. All right.

15 MR. SHERMAN: Before we
16 conclude, I want it noted for the record that
17 I think the information and stories that were
18 known to other members of the Dental
19 Commission fall within the scope of
20 paragraph 3 of the 30(b)(6) deposition, and I
21 believe that the commission's position on the
22 meaning of the declaratory ruling falls
23 within the scope of paragraph 4 of the
24 30(b)(6) notice.

25 We'll conclude this

1 deposition, but I will reserve the right to
2 seek more time with this witness on these
3 matters.

4 MR. SHAPIRO: Thank you.

5 MR. SHERMAN: Thank you very
6 much.

7 (Off the record discussion.)

8 (Whereupon, the witness was
9 excused at 10:40 a.m.)

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Jeanne Strathearn

Subscribed and sworn to before me
on this __ day of _____, 2013.

Notary Public

My commission expires:

1 CERTIFICATE

2
3 STATE OF CONNECTICUT)
4) SS.
5 COUNTY OF HARTFORD)

6 I, Jill K. Ruggieri, C.R.R., R.M.R.,
7 L.S.R. 506, a Notary Public duly commissioned
8 and qualified, do hereby certify that
9 pursuant to Notice and the Federal Rules of
10 Civil Procedure, there appeared before me on
11 January 4, 2013, at 9:32 a.m., at the Offices
12 of United Reporters, Inc., 90 Brainard Road,
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14 following-named person to wit: JEANNE
15 STRATHEARN, who was by me first duly sworn to
16 testify to the truth and nothing but the
17 truth of her knowledge touching and
18 concerning the matters in the controversy in
19 this cause; that she was thereupon carefully
20 examined upon her oath and her testimony
21 reduced to writing under my direction by
22 computer-aided transcription; that the
23 deposition is a true record given by the
24 witness; that the deposition may be signed
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6 of any attorney or counsel employed by the
7 parties hereto or financially interested in
8 the action.

9 In witness whereof, I have hereunto set
10 my hand this ____ day of _____,
11 2013.

12
13
14
15
16 _____
17 Jill K. Ruggieri, C.R.R.,
18 R.M.R., L.S.R. 506
19 Notary Public
20

21 My commission expires:
22 June 30, 2017
23
24
25

I N D E X

DEPOSITION OF JEANNE STRATHEARN

EXAMINATION	Page
By Mr. Sherman	4

PLAINTIFF'S EXHIBITS

(For identification)

EXHIBIT	PAGE
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*Instructed not to answer:

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